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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 529

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. TERRY and JOHN O. YOUNG, individually, and on behalf of all other stockholders similarly situated,

Appellants,

vs.

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON MAYORD, KENZIE S. BAGSHAW, BEATTY B. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNSON, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL and HELEN E. HAYES, as Administratrix of Estate of Lester D. Hayes,

and

Appellees,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY TO MOTIONS TO DISMISS APPEAL

Joseph W. Burns,
AUSTIN, BURNS, APPELL & SMITH,
535 Fifth Avenue,
New York 17, New York,

Laurence Sovik,
SMITH AND SOVIK,
300 Wilson Building,
Syracuse 2, New York,
Attorneys for Appellants.

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The motion of the appellees to dismiss and the motion of the intervenor to dismiss or affirm are not supported by any factual or legal argument that appellants' points are

without substance or that the decision below is based on an adequate non-federal ground. Both motions are more in the nature of briefs on the merits, arguing that the lower court decision was correct.

1. *The issue is not whether Section 199 of the New York Insurance Law could constitutionally authorize mutualization over the objection of dissenting stockholders, but whether its failure to provide for an independent appraisal of the value of the dissenting stockholder shares and judicial review thereof is unconstitutional.*

Appellees contend (p. 15) that Section 199 "in and of itself" does nothing to the stockholders. Courts rarely decide the constitutionality of a statute *in vacuo*. The question is generally the *application* of the statute. In *Diocese of Rochester* v. *Planning Board*, 1 N. Y. 2d 519, 521; 154 N. Y. S. 2d 849, 857, the court stated: "An ordinance, constitutional on its face (or deemed so) may be construed and applied in an unconstitutional manner. If the construction of an ordinance as applied to a particular piece of property and a particular set of facts is so arbitrary and unreasonable as to result in an invasion of property rights, the action of the zoning board thereunder will be invalidated."

It is possible that plans of mutualization might be devised which do not deprive stockholders of constitutional rights. The question is whether the failure of the New York statutes to provide for an appraisal or judicial review is substantial and warrants review by this Court.

The statement by the intervenor (p. 6) that the New York statute has been the prototype of similar provisions in 17 other jurisdictions is misleading, if not plainly erroneous. As stated in appellants' Jurisdictional Statement (p. 9) eight of the 17 other states provide for an

appraisal or judicial review to determine the fair value of the shares of dissenting stockholders. A very substantial question justifying review by this Court is the split among these states on this issue.

The cases cited by the intervenor at page 6 do not support his contention that similar provisions have been upheld as constitutional in other states.

In *Belden* v. *Union Central Life Ins. Co.*, 143 Ohio St. 329, 55 N. E. 2d 629, app. div. 323 U. S. 674, the action was brought not by a stockholder but by a policyholder. The court, citing, inter alia, the section of the Ohio Code giving the dissenting stockholders a right of appraisal (unlike the New York statute), upheld the statute as constitutional on its face *but said that a statute constitutional on its face nevertheless could be unconstitutional in its operation on a particular state of facts.* The court held the policyholders did not show this because they had no vested right in the organizational structure of the stock insurance company, since such right existed only in the stockholders. In the *Belden* case, therefore, it was a question of an improper person raising the constitutional question.

The case at bar is clearly distinguishable on two grounds: (1) that it is stockholders who are contesting the constitutionality of the statute and (2) New York does not give a right of appraisal.

Ohio Nat'l. Life Ins. Co. v. *Struble*, 82 Ohio App. 480, 81 N. E. 2d 622, app. dis. 150 Ohio St. 409, 82 N. E. 2d 856, cited by the intervenor, which also involved the Ohio statute, was brought by stockholders. Although they made four contentions, only one involved a constitutional question, i.e., impairment of contracts. The court concluded that the amendment made subsequent to their stock acquisition merely changed the procedure for dissenting stock-

holders to obtain the fair cash value of their stock, and thus did not affect vested rights. The stockholders thus did not raise the question of due process of law at all. Here the question has been raised, and this Court should determine whether the amendments to the New York statute affected vested rights.

In *Application of Prudential Insurance Co.*, 132 N. J. Eq. 170, 28 A. 2d 120, a policyholder objected to the mutualization. The court at 132 N. J. Eq. 176 had this to say in answer to his objection:

> "Nor does the legislation violate the due process clause of the federal constitution by failing to establish a reasonable measure for determining the fair value at which the shares may be purchased for retirement for the purpose of complete mutualization. The contrary seems to be true and the statute presents two methods; the one, as here by bargaining resulting in a contract, the execution of which is subject to the approval of the Chancellor, *and, the other, an appraisal to be instituted by the owners of the outstanding stock, such appraisal likewise being subject to inquisition and approval by the Chancellor.* The rights of the policyholders are fully protected by the legislative mandate." (Italics supplied.)

According to the court, therefore, in the *Prudential* case, the stockholders had the right of appraisal subject to judicial review which they do not have in this case and it is the appellants' contention that the absence of such right violates due process of law.

It is worth noting also that in that case the last remaining 536.76 stockholders who refused to sell at the appraised value of $455 per share were able to negotiate a sale of the stock to the company at $1500 per share.

This amount could never be realized under the New York statute because there, once the value is set, it must be adhered to. It is no longer a voluntary negotiation but a compulsory one without the corresponding right of appraisal.

The issue is not whether a state has the *power* to amend or repeal legislation, and thus affect corporate charters. The issue is whether in the exercise of such power a state may deprive stockholders of vested property rights. The substantial question is whether vested property rights were affected in this case.

Appellees statement (p. 17) that the Company was authorized under the statute to change from a non-participating to a mutual company does not define the issue. Statutes generally permit a company to merge with another, and lose its identity, but in such case a dissenting stockholder has a right to have the value of his stock determined subject to judicial review.

Appellees description (p. 15) of the plan of mutualization as merely a "continuing offer" of the company to purchase the stock of dissenting stockholders is not a correct description of the plan. The *purpose and effect* of the plan is to eliminate completely all assets of the company applicable to the common stock. The company has proceeded to do just that, and intends to set aside $1,000 and nothing more to pay for each share of stock whenever the stockholder gives up the fight. A share can never be worth more than $1,000, as eventually there will not be any non-participating policies or dividends. It *hopes* to accumulate the $1,000 during a 10 year period, but may never do so.

The contention of the intervenor (p. 7) that the 1939 amendment merely acts to prevent dissenting stockholders from "exporting a disproportionate sum" for their shares does not answer the question, but rather poses it. The real

question is WHO determines what is a proportionate sum, the directors of the company, or a disinterested administrative or judicial body. The whole basis of statutes providing for appraisal and judicial review is to authorize a court to determine the fair value, in order to prevent a majority from being arbitrary.

2. *In determining whether review should be granted, this Court is concerned with legal rights not extraneous motives of the parties.*

The *ad hominem* argument of appellees (p. 20) relating to what they consider the "real objective" of appellants is irrelevant. To be objective in their argument, appellants purposely avoided referring in their Jurisdictional Statement to appellees' desire to perpetuate themselves as salaried officers of the company, without owning a share, and with no investment of their own funds.

Appellants believe the questions presented are substantial and should be reviewed by this Court.

Respectfully submitted,

Joseph W. Burns,
AUSTIN, BURNS, APPELL & SMITH,
535 Fifth Avenue,
New York 17, New York,

Laurence Soyik,
SMITH AND SOVIK,
300 Wilson Building,
Syracuse 2, New York,

Attorneys for Appellants.